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In The Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

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INTEREST OF AMICUS CURIAE

The State of California submits this brief pursuant to Supreme Court Rule 37.4 as an amicus curiae in support of the respondents because of its continuing interest in the important educational and constitutional issues raised here.

California, like all other States, has the obligation to ensure that the doors of its institutions of higher education are open to all segments of its population. In addition, like many of its sister States, California recognizes that racial, ethnic, and cultural diversity at its public institutions of higher education produces graduates who are better prepared to contribute politically, socially, and economically to California's multicultural future. As the most populous State in the Union and one of the most diverse, California has a unique opportunity to reap the educational benefits of such diversity. At the time of the 2010 U.S. Census, California had the largest White, Hispanic,[1] and Asian populations in the country, as well as the most American Indians/Alaskan Natives and Native Hawaiians/Pacific Islanders.[2] It

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[1] The 2010 U.S. Census form uses the term "Hispanic" to include persons of Mexican, Mexican American, Chicano, Puerto Rican, Cuban, Spanish, Central American and South American origins. http://www.census.gov/prod/cen2010/briefs/c2010br-04.pdf. For the sake of clarity, we use the term "Hispanic" throughout this brief in the same way.

[2] U.S. Census Bureau, Statistical Abstract of the United States: 2012 (131st Ed. 2011) at 23, tbl. 18 (Resident Population by Hispanic Origin and State: 2010) and 24-25, tbl. 19 (Resident

(Continued on following page)

had the fifth largest Black/African American population.[3] As of 2014, Hispanics account for the largest portion of California's population, which makes California the largest State in the country in which non-Hispanic Whites do not make up the plurality.[4] Hispanics, African Americans, Native Americans, Asians, Pacific Islanders and people of multiple races account for more than 61% of all Californians.[5] Thus, California has a particularly compelling interest in ensuring that its public universities and colleges produce graduates who are prepared to live, work and assume positions of leadership in a diverse, multicultural society. Preparing graduates to contribute effectively in such a pluralistic environment is among the chief educational benefits that flow from diversity on college and university campuses.

The Fifth Circuit Court of Appeals recognized that Texas secondary school students increasingly attend segregated schools.[6] After many years of progress in desegregating its primary and secondary

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Population by Race and State: 2010), *available at* http://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/pop.pdf.

[3] *Id.* at 24, tbl. 19.

[4] California Governor's Budget Summary (2015-16), at 140, *available at* http://www.ebudget.ca.gov/2015-16/pdf/BudgetSummary/FullBudgetSummary.pdf.

[5] *Id.* at 141.

[6] *Fisher v. University of Texas at Austin*, 758 F.3d 633, 645, 650-51 (5th Cir. 2014).

schools, California, like the rest of the country, is also experiencing increasing segregation of its schools. Because of this "re-segregation," today more than ever, diversity within institutions of higher education serves a State's compelling interest in ensuring that future leaders are adequately prepared to function productively in an increasingly diverse and increasingly urban society. Many students, both White and non-White, arrive at college having had limited exposure to people of different races, cultures, and backgrounds, and with implicit assumptions already imprinted upon them. Their college years provide students the opportunity to replace those assumptions with real-world experience. By interacting "with different people from different places, cultures, races, religions, and socio-economic backgrounds," students "learn the lessons that will shape their behavior for the rest of their lives."[7]

The educational experiences uniquely provided by a diverse student fellowship are critical to future civic participation and leadership. California faces complex and daunting fiscal, social, and environmental challenges in its future. It recognizes that to meet those challenges, it must provide its future leaders and citizens a heterogeneous educational environment that reflects, as much as feasible, the varied

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[7] Chris Chambers Goodman, *Retaining Diversity in the Classroom: Strategies for Maximizing the Benefits that Flow from a Diverse Student Body*, 35 Pepp. L. Rev. 663, 703 (2008) (footnote omitted).

cultures and needs of this State. California, therefore, is keenly interested in this Court's continued recognition of diversity as a compelling state interest in higher education and continued flexibility for States to serve as "laboratories for experimentation" to devise ways to attain that goal.[8]

California offers the perspective of a State that, while it currently does not consider race in its admission decisions, still endeavors to achieve diversity in its public universities and colleges for the benefit of all students. In November 1996, the California electorate amended California's constitution through Proposition 209 to provide, in relevant part, that the "State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[9] Because of Proposition 209, this State's public institutions of higher education cannot avail themselves of the constitutionally-permissible race-conscious admissions options approved in this Court's ruling in *Grutter v. Bollinger*.[10] As a consequence, the University of California has struggled to attain a level of racial diversity on its

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[8] *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

[9] Cal. Const. art. I, § 31, subdiv. (a), added by initiative, Gen. Elec. (Nov. 5, 1996) (commonly known as Proposition 209).

[10] 539 U.S. 306 (2003).

campuses that will achieve the educational benefits of a diverse student body.[11] For example, in 2014, the University of California admitted more Hispanics than Whites system-wide for the first time. However, based on the make-up of the applicant pool, Hispanics were still admitted at a rate nine percentage points lower than White applicants.[12] Moreover, Hispanic students admitted to the University of California system are concentrated at the less competitive schools and are relatively excluded from the most selective campuses.[13] In the past two decades, the number of Hispanic applicants to the University of California's campuses in Los Angeles and Berkeley has increased by 350%, but the number admitted has remained relatively constant.[14]

California's decision to forgo the consideration of race in attempting to achieve optimal student body diversity is, of course, a policy choice that California's voters are entitled to make. However, Proposition 209 constitutes merely a choice about *how* to achieve

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[11] The State is informed that the President and Chancellors of the University of California plan to submit a brief that will explore in detail the impacts of Proposition 209 on the enrollment of underrepresented students of color at the University of California.

[12] The Campaign for College Opportunity, *The State of Higher Education in California: Latinos* (April 2015), at 15, *available at* http://collegecampaign.org/wp-content/uploads/2015/04/2015-State-of-Higher-Education_Latinos.pdf.

[13] *Id.* at 14-15.

[14] *Id.* at 15.

diversity and does not reflect a lessening of California's commitment to student body diversity as an essential component of a comprehensive collegiate education.[15] Moreover, California has a strong interest in retaining the flexibility to change course in the future should it desire to do so as it continues to experiment with ways to ensure that the doors of its public institutions are truly open to all. Similarly, California believes that each State should have the broadest discretion allowable – within the limits of the Fourteenth Amendment as described by this Court in *Grutter* and *Fisher I* – to decide for itself how to fashion suitable admission standards.

SUMMARY OF ARGUMENT

It is now well established in cases decided by this Court that States, through their public institutions of higher education, have a compelling interest in securing the educational benefits of a diverse student body. If necessary to attain that diversity, public colleges and universities may consider race as one of many factors in a holistic, individualized assessment

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[15] *See* Brief Amicus Curiae of the President and Chancellors of the University of California in Support of Respondents, pp. 20-29, filed in *Fisher v. University of Texas at Austin (Fisher I)*, ___ U.S. ___, 133 S. Ct. 2411 (2013).

of an applicant.[16] This Court has recognized that a diverse student body at public universities provides significant benefits to all students. Majority and minority students alike benefit from campus environments that more realistically reflect the pluralistic society in which they will be expected to contribute socially and economically, and to assume positions of leadership.

In addition, meaningful diversity on college and university campuses benefits not only students, but society as a whole. *Grutter* acknowledged the overriding importance of preparing students for work and citizenship. Students educated in an environment of educational pluralism are better prepared for an increasingly diverse workforce and society. It has been shown that because of the "re-segregation" of American society, many students enter college with limited precollege exposure to people of different races, ethnicities, and cultural backgrounds. Interaction during college years with students of different races, ethnicities, and cultural backgrounds can help disrupt the cycle of re-segregation and lead to more positive inter-racial interaction and understanding.

But to reap the full educational benefits of a heterogeneous student body, it is sometimes not enough that an institution admits students from

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[16] *Fisher I*, 133 S. Ct. at 2418; *Grutter*, 539 U.S. at 328-37; *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 311-20 (1978).

different racial and ethnic backgrounds. It must also have the flexibility to ensure that those students reflect the broad diversity within their racial and ethnic communities, including socio-economic and geographic diversity. A university's compelling interest in obtaining the educational benefits of a diverse student body, therefore, must necessarily encompass achieving a student body that includes students of color who reflect the broad range of individual experiences within communities of color. Admissions methods that admit students based solely on their ranking within their school class may produce more admittees of color, but a State may still have a legitimate need to achieve additional diversity. In those circumstances, a State should have the ability to supplement – not replace – percentage plans that look only to class rank with holistic plans that include race as one of many factors considered when creating a diverse student body.

Finally, this Court has acknowledged that effective participation by members of all racial and ethnic groups in the nation's civic life is essential if the dream of one nation, indivisible, is to be realized.[17] Higher education plays a pivotal role in facilitating that participation and in sustaining the country's shared political and cultural heritage.[18] It is, therefore, imperative that underrepresented students of

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[17] *Grutter*, 539 U.S. at 332.

[18] *Id.* at 331.

color have access to this important gateway. Access to higher education helps prepare students for full participation in the social and economic life of the community after graduation. But beyond that, a system of higher education that is truly open to all also helps legitimize our social and political institutions.[19]

California urges this Court to reaffirm that the compelling interest in providing the educational benefits of a diverse student body can justify the consideration of an individual's contribution to diversity both among and within racial and ethnic groups as part of a holistic admissions plan.

ARGUMENT

I. THE EDUCATIONAL BENEFITS OF DIVERSITY AT PUBLIC COLLEGES AND UNIVERSITIES, INCLUDING RACIAL DIVERSITY, ARE BROAD AND WELL-ESTABLISHED

Today, more than ever, college graduates need to be skilled not only in their substantive fields of study, but at interacting productively in a multicultural society and globally interconnected world. Increasingly, however, students attend segregated primary and secondary schools and may graduate from high school having had little contact with people of races or

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[19] *See id.* at 332.

cultures different from their own.[20] Thus, diversity – particularly racial and ethnic diversity – at their colleges and universities takes on even greater significance.

Diversity encompasses the "broad understanding that all types of background experiences . . . bring different perspectives and added complexity" to human interactions.[21] Although the term "diversity" refers broadly to a number of social, political, and cultural factors, including "class, national origin, sexual orientation, geographic region, political affiliation, religion, ability/disability and age," race, like gender, has "a distinct, significant, and foundational role in shaping experiences in the U.S."[22]

As a consequence, this Court has held that the benefits to be gained from having diverse student bodies at our public colleges and universities are compelling enough to justify, in appropriate circumstances, the consideration of race in admissions decisions. As this Court has recognized, not every decision influenced by race is objectionable; rather, "[c]ontext matters."[23] In the context of higher education,

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[20] Victor B. Saenz, *Breaking the Segregation Cycle: Examining Students' Precollege Racial Environments and College Diversity Experiences*, 34 Rev. Higher Educ. 1, 4 (2010).

[21] Meera E. Deo et al., *Paint by Number? How the Race and Gender of Law School Faculty Affect the First-Year Curriculum*, 29 Chicano-Latino L. Rev. 1, 3 (2010).

[22] *Id.* (footnote omitted).

[23] *Grutter*, 539 U.S at 327.

the consideration of race, along with a host of other factors that differentiate students from one another, may be necessary to achieve the educational benefits of a heterogeneous student body.[24]

A. Diversity Benefits Students in the Classroom

The benefits of diversity are not merely theoretical, but real and substantial.[25] Numerous studies have confirmed this, at every level of a student's education.[26] At the post-secondary level, campus diversity promotes cross-racial understanding, breaks down racial stereotypes, fosters better understanding of different races, and leads to classroom discussions that are livelier, more spirited, more enlightening, and more interesting.[27]

Students of color benefit from efforts to ensure greater racial and ethnic diversity by gaining greater access to elite educational institutions[28] and the social

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[24] *Id.* at 325.

[25] *Id.* at 330.

[26] *See, e.g.*, Emily J. Shaw, *Researching the Educational Benefits of Diversity*, College Board Research Report No. 2005-4, *available at* http://research.collegeboard.org/publications/content/2012/05/researching-educational-benefits-diversity (surveying social science studies regarding the educational benefits of diversity).

[27] Goodman, *supra* note 7, at 667-68.

[28] "The 468 most selective colleges spend anywhere from two to almost five times as much per student. Higher spending in the most selective colleges leads to higher graduation rates, greater access to graduate and professional schools, and better

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and political opportunities that flow from that.[29] Moreover, campuses with greater racial and ethnic diversity generally have more positive racial climates for Hispanic and African American students.[30] Without adequate racial and ethnic diversity, students of color are more likely to feel isolated or perceive that they are being reduced to stereotypes and to experience other racial tensions.[31] Such tensions are obstacles to obtaining the educational benefits of diversity because they undermine cross-racial interaction and classroom participation by students of color.[32]

Educational diversity also benefits the student body as a whole by helping to foster "well-developed

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economic outcomes in the labor market, when comparing with white, African-American, and Hispanic students who are equally qualified but attend less competitive schools." Anthony P. Carnevale and Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Privilege*, Georgetown Public Policy Institute at 7 (July 2013), *available at* https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf.

[29] Osamudia R. James, *White Like Me: The Negative Impact of the Diversity Rationale on White Identity Formation*, 89 N.Y.U. L. Rev. 425, 447 (May 2014).

[30] William C. Kidder, *Misshaping the River: Proposition 209 and Lessons for the* Fisher *Case*, 39 J. College & Univ. L. 53, 124 (2013).

[31] Liliana M. Garces and Uma Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 Educational Researcher 115, 119 (2014); Elise C. Boddie, *Critical Mass and the Paradox of Colorblind Individualism in Equal Protection*, 17 U. PA. J. Const. L. 781, 790-91 (2015).

[32] Garces & Jayakumar, *supra* note 31, at 119.

critical thinking skills, cognitive development, and an ability to interact with other members of our increasingly diverse society."[33] Indeed, students who interact with peers from diverse backgrounds show greater relative gains in critical and active thinking.[34] Professor Kevin R. Johnson, Dean of King Hall at the University of California, Davis, argues that "diversity and excellence are inextricably interrelated, mutually reinforcing, and well worth striving for by any . . . school worth its salt."[35] He concludes that this Court's decision in *Grutter* merely confirmed "the conventional wisdom" that a "racially diverse student body contributes to a better learning environment for students and a higher-quality" education.[36] However, where students of color have a diminished sense of belonging and security because of their small numbers, they are less likely to engage in university life, which

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[33] Deo et al., *supra* note 21, at 31 (footnote omitted).

[34] *Id.*

[35] Kevin R. Johnson, *Symposium: The Future of Legal Education: The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective*, 96 Iowa L. Rev. 1549, 1550 (2011).

[36] *Id.* at 1556; *see also*, Kevin R. Johnson, *Cry Me a River: The Limits of "A Systemic Analysis Of Affirmative Action In American Law Schools,"* 7 Afr.-Am. L. & Pol'y Rep. 1, 16 (2005) ("The impact of environment on students of color in law school, particularly the effects of unconscious racism on minority students' feelings of belonging and their actual performance, is well-documented.").

undermines the quality and quantity of interactions among students of different races and ethnicities.[37]

A 2012 article in the Rutgers Race and Law Review analyzed the results of a 10-year study of law students and found not only that attitudes of entering law students differed by race, but also that such differences can provide educational benefits.[38] For example, the students were given a list of cases that were discussed during law school and asked to rate how relevant they were to race.[39] The cases involved issues such as a subway shooting, law school diversity, peremptory challenges to jurors and the right to serve on juries, Japanese internment and the detention of citizens during wartime, and unconscionability of contracts.[40] In some instances, the students' assessment of the relevance of the cases to race varied widely depending on the student's race, especially among men.[41] The authors pointed out that "[i]f law school classes included only White students, the full

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[37] Boddie, *supra* note 31, at 789.

[38] Charles E. Daye et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis*, 13 Rutgers Race & L. Rev. 75-S 2011-2012 (2012). The analysis in this article focused only on differences and similarities between the Black and White students, broken down by gender. *Id.* at 100-S.

[39] *Id.* at 166-S-167-S.

[40] *Id.* at 167-S. The cases were *People v. Goetz*, 68 N.Y.2d 96 (1986); *Grutter*; *Batson v. Kentucky*, 476 U.S. 79 (1986); *Korematsu v. U.S.*, 323 U.S. 214 (1944), reh'g den., 324 U.S. 885 (1945); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

[41] Daye et al., *supra* note 38, at 168-S.

range of voices and perspectives about the nature of common legal cases would not necessarily be present."[42] Further, a majority, and in some cases an overwhelming majority, of the students, White and Black, men and women, recognized the benefits of this range of perspectives.[43] One of the most significant findings was that most students either agreed or strongly agreed that diversity "[i]mproves abilities to work and get along with others after graduation in an increasingly diverse society" and that diversity "[h]ad an overall positive effect" on their educational experience in law school.[44] Moreover, the study found that all students, regardless of race or ethnicity, were affected by the racial diversity of their law school and "high intergroup contact."[45]

B. Diversity in the Classroom Creates a Workforce Better Prepared to Function Productively in a Pluralistic and Globally-Connected Society

Beyond the benefits to classroom learning itself, increased enrollment of underrepresented students of color equips students to enter a diverse society upon graduation and to contribute to social and cultural

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[42] *Id.* at 169-S.

[43] *Id.* at 174-S.

[44] *Id.*

[45] *Id.* at 185-S.

harmony.[46] This Court has acknowledged the overriding importance of preparing students for work and citizenship, and has recognized that a heterogeneous student body better prepares students for an increasingly diverse workforce and society.[47] Employers and corporate and military leaders agree that in the modern workplace, experience with, and the ability to work effectively with, individuals from different backgrounds and cultures is an important proficiency.[48] It is significant that 65 major corporations filed a brief supporting affirmative action in higher education in *Grutter*, and none filed a brief opposing it.[49] Similarly, an amicus curiae brief was filed in *Fisher I* by several dozen Fortune-100 companies, many of them the same companies that filed in *Grutter*.[50] Again, no such brief was filed in support of Ms. Fisher.

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[46] Deo et al., *supra* note 21, at 31; *see also* Rebecca K. Lee, *Implementing* Grutter's *Diversity Rationale: Diversity and Empathy in Leadership*, 19 Duke J. Gender L. & Pol'y 133, 141 (2011) (citing numerous amicus curiae briefs in *Grutter* submitted by businesses and corporations emphasizing the importance of an appreciation of diversity in developing leadership); Goodman, *supra* note 7, at 669 (quoting Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation and Disability into Law School Teaching*, 32 Willamette L. Rev. 541, 553-54 (1996)).

[47] *Grutter*, 539 U.S. at 330-31.

[48] Lee, *supra* note 46, at 139-41.

[49] Kidder, *supra* note 30, at 118.

[50] Brief for Amici Curiae Fortune-100 and Other Leading American Businesses in Support of Respondents, filed in *Fisher I*.

Analyzing the briefs filed in *Grutter*, Professor Rebecca K. Lee, of Thomas Jefferson School of Law, observed that workplace diversity contributes to a work environment that is more effective, less discriminatory, and more reflective of the multicultural marketplace.[51] The briefs also showed that input from a diverse workforce can contribute to better decision-making and creative problem-solving, enabling businesses to compete more successfully in the marketplace.[52] Professor Lee further noted that the brief of General Motors Corp. emphasized that cross-cultural training must be provided in our colleges and universities because:

> business employers cannot reproduce the protected environment of the school setting where differing perspectives can be shared freely. Nor can employers provide a non-hierarchical setting where learning can best take place among equally situated individuals.[53]

Development of these critical-thinking skills in a setting that includes the participation of students of color contributes to a more sophisticated and nuanced understanding of cultural differences and conflicts.

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[51] Lee, *supra* note 46, at 141-42 (footnotes omitted).

[52] *Id.*

[53] *Id.*

C. Diversity in Institutions of Higher Education Counters the Effects of Re-segregation

Studies have found that school segregation across the nation is substantially worse than it was forty years ago.[54] In fact, California has the most segregated schools for Hispanics of any State and is the third worst for African Americans.[55] Most of the nation's largest cities "have predominantly minority school districts, with most of them surrounded by overwhelmingly White suburban school districts."[56] The vast majority of Hispanic students (80%) and African American students (74%) in the country's public schools attend schools where at least 50% of their classmates are non-White.[57] A significant percentage (43% of Hispanic students and 38% of African

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[54] Gary Orfield & Genevieve Siegel-Hawley, UCLA Civil Rights Project/Proyecto Derechos Civiles, *E Pluribus . . . Separation, Deepening Double Segregation for More Students* (Sept. 2012) at xviii, *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus . . . separation-deepening-double-segregation-for-more-students.

[55] *Id.* at 46, 50; *see also* Gary Orfield & Jongyeon Ee, UCLA Civil Rights Project/Proyecto Derechos Civiles, *Segregating California's Future: Inequality and Its Alternative 60 Years After* Brown v. Board of Education (May 2014) at 3, 27, 31, *available at* http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/segregating-california2019s-future-inequality-and-its-alternative-60-years-after-brown-v.-board-of-education/orfield-ee-segregating-california-future-brown-at.pdf.

[56] Saenz, *supra* note 20, at 3 (citations omitted).

[57] Orfield & Siegel-Hawley, *supra* note 54, at 19.

Americans) attend "intensely segregated" schools – those where 10% or fewer of their fellow students are White.[58] In California the numbers are even more dramatic. More than 91% of Hispanic students and more than 90% of African American students attend schools with a majority non-White enrollment.[59] A smaller, but still significant, percentage attends schools where the non-White enrollment is 90% or higher: 52.5% of Hispanic students and 40.6% of African American students.[60]

Across the country, all students are increasingly less likely to live in diverse communities or attend diverse schools, which curtails their opportunities for meaningful interaction with people of different races, ethnicities, or cultures prior to college.[61] As a consequence, "more and more students come to college with few or no experiences with racially or ethnically diverse peers."[62]

Research shows that "racial separation, especially in the adolescent years, could potentially foster negative effects, allowing stereotypes and myths about other racial and ethnic groups to flourish because students lack direct experiences that can

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[58] *Id.*

[59] *Id.* at 85.

[60] *Id.*

[61] Saenz, *supra* note 20, at 4 (examining data for schools across the country).

[62] *Id.* at 2.

contradict or challenge their misinformed opinions."[63] Researchers at the University of North Dakota, where an overwhelming percentage of the students are White, also found that students "bring with them ideological predispositions and the baggage of political socialization by parents, peers, schools, and the media."[64] Students' "perceptions of people of color are circumscribed by their upbringing in racially homogeneous communities, and by their lack of exposure to diversity in the classroom."[65] Students who come from the most segregated of precollege environments are likely to benefit significantly from attending diverse institutions.[66] A student's college experiences with other races and cultures can "significantly mediate or interrupt" the "perpetuation effects" of increasingly segregated precollege environments.[67]

Thus, students, both White and non-White, benefit from exposure to diverse classmates not only in the classroom experience, but also in the community and

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[63] *Id.* at 5.

[64] Kathryn R.I. Rand & Steven Andrew Light, *Teaching Race Without a Critical Mass: Reflections on Affirmative Action and the Diversity Rationale*, 54 J. Legal Educ. 316, 322 (2004).

[65] *Id.* at 327.

[66] Saenz, *supra* note 20, at 31; *see also* Brandon Paradise, *Racially Transcendent Diversity*, 50 U. Louisville L. Rev. 415, 469 (2012) (reviewing studies that research the impact of racially mixed secondary schools on experiences of attending those schools).

[67] Saenz, *supra* note 20, at 30-31.

workplace after graduation.[68] College and university campuses provide an environment that can counter the effects of increased segregation and create greater cross-cultural respect and competence among our future leaders.

D. Diversity at our Institutions of Higher Education Is Essential to a Just and Open Society

Diversity in institutions of higher education also plays an important role in our democratic system.[69] It facilitates full and effective participation by members of all racial and ethnic groups in sustaining the country's shared political and cultural heritage.[70] Not only does access to higher education help prepare students to take their places in the social and economic life of the community after graduation, but a system of higher education that is truly open to all

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[68] Goodwin Liu & William L. Taylor, *School Choice to Achieve Desegregation*, 74 Fordham L. Rev. 791, 797 (2005) (observing that Black and White students who graduate from desegregated schools are more likely "to attend college, work, and live in desegregated settings").

[69] *See, e.g.*, Carla D. Pratt, *The Tenth Annual Frankel Lecture: Commentary: Taking Diversity Seriously: Affirmative Action and the Democratic Role of Law Schools: A Response to Professor Brown*, 43 Hous. L. Rev. 55, 57 (2006).

[70] *Grutter*, 539 U.S. at 332.

racial and ethnic groups also helps legitimize our social and political institutions and leaders.[71]

This Court explained in *Grutter* that for our leaders to have legitimacy in the eyes of the citizenry, the path to leadership must be "visibly open to talented and qualified individuals of every race and ethnicity."[72] Thus, it is critical that all members of this heterogeneous society have confidence in "the openness and integrity of the educational institutions" that serve as the training ground for the country's leaders.[73]

Put another way, the "delegated trust" placed in our government and the legitimacy of "the project that is our democracy" is increased when "individuals from historically subordinated and marginalized groups have a meaningful opportunity to effectively participate in our democracy."[74] The legitimacy that diversity adds to the democratic process has been described in the context of legal education as follows:

> A democratic rationale for affirmative action in legal education looks forward to creating diverse democratic leadership for the future. But it also looks back to a time when our democracy stood on the verge of collapse because we did not fully subscribe to the

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[71] *See id.*; Goodman, *supra* note 7, at 670.

[72] *Grutter*, 503 U.S. at 332.

[73] *Id.*

[74] Pratt, *supra* note 69, at 59.

> foundational democratic principles of freedom, inclusion, and equality. The civil unrest that erupted during the Civil Rights Movement is indicative of what can happen when a nation that proudly professes to be built upon democratic ideals fails to extend the rights and privileges of democracy to everyone equally.[75]

Research also suggests that the quality of leadership improves when the ranks of leaders are diverse and those leaders encourage diversity at all levels of employment.[76] Thus, the benefit of diversity "extends far beyond the desire to open the doors of individual success to people of color."[77] Rather, diversity is essential to creating not only the perception, but also the reality, of a just and open society. As this Court recognized in *Keyishian v. Board of Regents of Univ. of State of N.Y.*,[78] and reiterated in *Bakke*, our "'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[79]

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[75] *Id.* at 62 (footnotes omitted).

[76] Meera E. Deo, *Empirically Derived Compelling State Interests in Affirmative Action Jurisprudence*, 65 Hastings L.J. 661, 704 (2013-2014).

[77] Pratt, *supra* note 69, at 62 (footnotes omitted).

[78] 385 U.S. 589, 603 (1967).

[79] *Bakke*, 438 U.S. at 313.

II. A UNIVERSITY HAS A COMPELLING INTEREST IN A STUDENT BODY THAT REFLECTS NOT JUST DIVERSE RACIAL, ETHNIC, AND CULTURAL GROUPS, BUT ALSO THE DIVERSITY WITHIN THOSE GROUPS

The Texas Legislature, in an attempt to find "race-neutral" ways to diversify enrollment at its public universities, adopted a plan under which students graduating in the top ten percent of their high school class are given automatic admission to the University of Texas. But, the Texas Legislature also imposed a cap on the portion of a given class that is admitted through this class-rank process.[80] Thus, the University of Texas retains some flexibility in the selection of the remaining students, who are admitted through a holistic review process. Texas exercises that flexibility to consider each applicant's individual characteristics, such as work experience, service to the school or community, socio-economic status of the family, and language spoken at home, among other factors. As part of the individualized holistic review, the university also considers race and ethnicity to help achieve a student body that reflects the broad range of experiences within racial and ethnic communities. This is consistent with this Court's recognition in *Grutter* that diminishing the force of stereotypes

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[80] *Fisher v. University of Texas at Austin*, 758 F.3d at 645.

about a "characteristic minority viewpoint" is a crucial part of an institution's educational mission.[81]

Class-rank admissions plans typically succeed in increasing the number of students of color admitted. This success, however, is based on the extreme segregation of high schools.[82] As a result, such plans may result in considerable homogeneity in many respects among the students of color admitted. For example, students of color admitted through the class-rank process may primarily come from lower-performing, under-resourced schools with predominantly non-White students.[83] Indeed, while the class-rank approach is useful in increasing racial, ethnic, and income diversity, its limitation is that it "sacrifices the type of thoughtful individualized consideration that allows admissions officials to consider which applicants will bring the most to a particular educational community."[84] For example, students of color who attend predominantly White, high-performing, well-resourced schools, can also contribute to a diverse, well-rounded and robust educational environment.[85]

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[81] *Grutter*, 539 U.S. at 333.

[82] Carnevale, *supra* note 28, at 38: Michelle Adams, *Isn't It Ironic? The Central Paradox at the Heart of "Percentage Plans,"* 62 Ohio St. L.J. 1729, 1739 (2001).

[83] James, *supra* note 29, at 504; Adams, *supra* note 82, at 1739, 1742.

[84] James, *supra* note 29, at 504.

[85] *See* Gerald Torres, Fisher v. University of Texas: *Living in the Dwindling Shadow of LBJ's America*, 65 Vand. L. Rev. En

(Continued on following page)

Holistic review admissions procedures, like the one used by the University of Texas, supplement one-dimensional class-rank admissions plans by considering a wide range of factors, including race and ethnicity. A State's compelling interest in reaping the benefits of educational diversity is not constrained, as Petitioner seems to suggest, to ensuring that a particular number of students of color are admitted.[86] Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[87]

This Court objected to the student assignment plan at issue in *Parents Involved in Community Schools v. Seattle School District No. 1* because it was not part of a broader effort to expose students "to widely diverse people, cultures, ideas, and viewpoints."[88] Further, this Court faulted the school district for employing "a limited notion of diversity," even with regard to race.[89] This Court clearly recognizes that people of color are not fungible and have

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Banc 97, 101 (2012); *see also* MALDEF et al., *Blend It, Don't End It: Affirmative Action and the Texas Ten Percent Plan After* Grutter *and* Gratz, 8 Harv. Latino L. Rev. 33, 54 (2005).

[86] *Bakke*, 438 U.S. at 315.

[87] *Id.*

[88] 551 U.S. 701, 723 (2007).

[89] *Id.*

different interests and needs.[90] Indeed, this Court instructs us that "[w]e do a disservice" to the goal of transforming our society into one "no longer fixated on race" when we fail "to account for the differences between people of the same race."[91]

Thus, to reap the full benefits of diversity, a college or university needs a broad spectrum of students of color, who reflect a host of different backgrounds and experiences. A university's compelling interest in obtaining the educational benefits of a diverse student body, therefore, must necessarily encompass achieving that broad range of students of color. When necessary to achieve this fuller degree of diversity, universities and colleges must retain the ability to supplement – not replace – percentage plans that look only to class rank, such as Texas' Top Ten Percent Law, with holistic plans that include race as one of many factors considered.

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[90] *See League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 433 (2006) (noting that it is improper to assume merely because a group of people are of the same race that they will think alike, share the same interests or prefer the same political candidates); *Bakke*, 438 U.S. at 323 (acknowledging "the variety of points of view, backgrounds and experiences of blacks in the United States.").

[91] *LULAC*, 548 U.S. at 434.

CONCLUSION

The Decision of the court of appeals should be affirmed.

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